

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SHAWN STEELE**

Claimant

VS.

**HOME DEPOT**

Self-Insured Respondent

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Docket No. 1,000,410

**ORDER**

Respondent appealed the October 7, 2004 Nunc Pro Tunc Award and the September 30, 2004 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on March 8, 2005.

**APPEARANCES**

Gary K. Albin of Wichita, Kansas, appeared for claimant. Clifford K. Stubbs of Roeland Park, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in both the Nunc Pro Tunc Award and the Award. At oral argument before the Board, the parties also agreed the medical records attached to the preliminary hearing transcript should be considered as part of the record for purposes of final award. Finally, at oral argument, the parties agreed a July 30, 2003 medical report from Dr. Philip R. Mills should be included as part of the record. Unfortunately, the parties did not provide a copy of Dr. Mills' report as requested. Accordingly, that report is not part of the record for this claim.

**ISSUES**

This is a claim for a January 5, 2001 accident and resulting left shoulder injury. In the September 30, 2004 Award, Judge Clark determined claimant sustained an 8.5 percent functional impairment to his left upper extremity at the shoulder level due to the January 2001 accident. The Judge also determined claimant was entitled to receive 14.56 weeks of temporary total disability benefits for that period following claimant's January 7, 2002 left shoulder surgery. The Judge entered the October 7, 2004 Nunc Pro Tunc Award to correct

the amount of medical expense respondent had paid that was eligible for reimbursement under K.S.A. 44-534a(b).<sup>1</sup>

Respondent contends Judge Clark erred. Respondent argues the Judge erred by awarding claimant 14.56 weeks of temporary total disability benefits following the January 2002 surgery as claimant failed to prove he was temporarily and totally disabled for that period. Moreover, respondent contends it is entitled to receive a credit against the benefits awarded claimant for both the \$4,270.20 of temporary total disability benefits and the \$8,152.88 of medical benefits that it paid claimant following a July 9, 2002 preliminary hearing order, which this Board later reversed.<sup>2</sup>

Conversely, claimant contends his permanent disability to the left upper extremity should be increased to 19 percent based upon the opinion of his medical expert witness, Dr. Pedro A. Murati. Claimant also argues that respondent is not entitled to any credit against claimant's award and must seek reimbursement from the Workers Compensation Fund.

The issues before the Board on this appeal are:

1. What functional impairment did claimant sustain to his left upper extremity as a result of the January 5, 2001 work-related injury to his left shoulder?
2. How many weeks of temporary total disability benefits is claimant entitled to receive?
3. What credit, if any, is respondent entitled to take against claimant's award?
4. Is claimant entitled to receive unauthorized medical benefits for the February 2003 visit to Dr. Pedro A. Murati?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

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<sup>1</sup> The Nunc Pro Tunc Award cited K.S.A. 44-530a(b), which appears to be a typographical error.

<sup>2</sup> Upon review of the preliminary hearing order and based upon the record presented, the Board determined claimant sustained a new and separate accident in February 2002 that was not compensable under the Workers Compensation Act and, therefore, the medical treatment and benefits that the preliminary hearing order addressed were not respondent's responsibility in this claim.

On January 5, 2001, claimant injured his left shoulder at work. A year later, in early January 2002, Dr. Bernard F. Hearon operated on claimant's left shoulder. During that surgery, Dr. Hearon debrided the glenohumeral joint synovitis, performed a subacromial decompression, and repaired a moderate to massive complete tear of the rotator cuff.

Unfortunately, on February 2, 2002, within a month of the left shoulder surgery, claimant slipped on ice outside a sandwich shop and fell, reinjuring his left shoulder. As a result of that accident, claimant again tore his left shoulder rotator cuff and later that year underwent a second left shoulder surgery, which likewise included debridement, decompression, and rotator cuff repair.

At claimant's attorney's request, claimant saw Dr. Pedro A. Murati in February and April 2003 to be evaluated. In formulating the functional impairment claimant sustained due to the January 2001 accident and the resulting January 2002 surgery, Dr. Murati concluded claimant sustained a 19 percent left upper extremity impairment under the *AMA Guides* (4th ed.).<sup>3</sup> The doctor testified, in part:

The first surgery was a more substantial surgery, so that's the only rating that this gentleman is going to get. The loss of range of motion, I will assign two-thirds of that to the first surgery. So two-thirds of 16 is -- well, I got a calculator right here, it's six. So if you deduct six from ten [*sic*], it will be just a ten left upper extremity impairment for the surgery, plus ten for the loss of range of motion; that will combine to only 19 percent upper extremity impairment for this condition.<sup>4</sup>

Respondent challenged Dr. Murati's use of Table 27 from the *Guides* in rating claimant's impairment. The doctor testified claimant would only have a 10 percent functional impairment to the left upper extremity if that table were not used, but that would not rate the partial amputation in the shoulder joint.

At Judge Clark's request, Dr. Paul S. Stein evaluated claimant in October 2003 to determine the functional impairment claimant sustained due to his January 2001 accident at work. In Dr. Stein's October 20, 2003 medical report to the Judge, the doctor stated it was not possible to determine with any certainty the functional impairment claimant sustained as a result of only the January 2001 accident but it was reasonable to assume the impairment would have been significant as there was a complete rotator cuff tear. Accordingly, Dr. Stein rated claimant's present left upper extremity impairment at 17 percent under the *AMA Guides* (4th ed.) and suggested that apportioning the rating evenly

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<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (*AMA Guides*) (4th ed.).

<sup>4</sup> Murati Depo. at 15-16.

for each accident would be fair and reasonable. Moreover, Dr. Stein concluded Table 27, which Dr. Murati used to rate claimant, was not applicable.

**1. What functional impairment did claimant sustain to his left upper extremity as a result of the January 5, 2001 work-related injury to his left shoulder?**

The Board concludes claimant's February 2, 2002 fall outside a sandwich shop was a new and separate accident that was not a natural consequence of his January 2001 injury at work. Consequently, claimant is not entitled to receive workers compensation benefits for his February 2002 fall and resulting left shoulder injury.<sup>5</sup>

The difficulty in this claim is separating the functional impairment caused by claimant's January 5, 2001 accident at work from the impairment caused by his later slip and fall. As indicated above, Dr. Stein suggests his 17 percent rating to claimant's left upper extremity should be evenly apportioned between claimant's two accidents. On the other hand, Dr. Murati concluded claimant sustained a 19 percent functional impairment to his left upper extremity due to the January 5, 2001 accident. Both opinions, however, are somewhat tarnished as Dr. Stein's apportionment is arbitrary and Dr. Murati's rating is based upon a questionable use of a table found in the *Guides*.

The Board concludes claimant's left upper extremity functional impairment lies somewhere between the 8.5 percent rating provided by Dr. Stein and the 19 percent rating provided by Dr. Murati. Accordingly, the Board averages those ratings and finds claimant sustained a 14 percent functional impairment to the left upper extremity due to his January 5, 2001 work-related accident.

**2. How many weeks of temporary total disability benefits is claimant entitled to receive?**

According to Dr. Stein's October 20, 2003 report, it appears claimant's left shoulder surgery that resulted from the January 2001 work-related injury took place on January 7, 2002. Unfortunately, while recovering from that surgery, claimant fell and reinjured his left shoulder. Before the February 2002 slip and fall, respondent paid claimant 1.23 weeks of temporary total disability benefits. And after that fall, respondent paid claimant 14.56 weeks of temporary total disability benefits following a July 9, 2002 preliminary hearing order.

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<sup>5</sup> See *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, rev. denied 231 Kan. 800 (1982) and *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973).

Respondent contends the Judge erred by awarding claimant the 14.56 weeks of temporary total disability benefits it paid after claimant's February 2002 slip and fall. Respondent argues the record contains no evidence that establishes the number of weeks claimant was rendered temporarily and totally disabled due to his January 2002 left shoulder surgery. The Board agrees. Consequently, claimant is entitled to receive the 1.23 weeks of temporary total disability benefits that were not challenged.

In short, claimant failed to prove he was entitled to receive additional temporary total disability benefits for the January 5, 2001 accident.

**3. What credit, if any, is respondent entitled to take against claimant's award?**

After claimant's February 2002 slip and fall, claimant required another left shoulder surgery. Following a July 9, 2002 preliminary hearing order, respondent represents it paid \$8,152.88 in additional medical expenses and \$4,270.20 (or 14.56 weeks) in temporary total disability benefits as a result of the February 2002 incident and resulting injury. As the February 2002 accident was a new and separate accident that does not qualify for workers compensation benefits, respondent requests a credit in the sum of \$12,423.08 against any disability benefits that claimant is awarded.

The Workers Compensation Act addresses the overpayment of benefits in at least three statutes. The first, K.S.A. 44-525, specifically addresses overpaid temporary total disability benefits. That statute provides that overpaid temporary total disability benefits shall be credited against the disability benefits awarded, with the credit first applied to the final week of the disability benefits awarded and then to each preceding week. K.S.A. 44-525 reads, in part:

(b) No award shall be or provide for payment of compensation in a lump sum, except as to such portion of the compensation as shall be found to be due and unpaid at the time of the award, or except at the discretion of the director on settlement agreements, and credit shall be given to the employer in such award for any amount or amounts paid by the employer to the employee as compensation prior to the date of the award.

(c) **In the event the employee has been overpaid temporary total disability benefits** as described in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the employee is entitled to additional disability benefits, the administrative law judge shall provide for the application of a credit against such benefits. The credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted. (Emphasis added.)

The preliminary hearing statute, K.S.A. 44-534a, provides that an employer or its insurance carrier is to be reimbursed by the Workers Compensation Fund for any excess compensation remaining due after applying the K.S.A. 44-525(c) credit, quoted above. K.S.A. 44-534a(b) provides:

If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the **employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525, and amendments thereto, as determined in the full hearing on the claim.** The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award. (Emphasis added.)

Finally, K.S.A. 44-556, in subsections (d)(1) and (d)(2), addresses a credit for excess compensation paid. But both subsections specifically refer to a credit for compensation that is paid during the pendency of an appeal of an order from this Board. Those subsections read, in part:

(d)(1) If compensation, including medical benefits, temporary total disability benefits or vocational rehabilitation benefits, has been paid to the worker by the employer or the employer's insurance carrier **during the pendency of review under this section and the amount of compensation awarded by the board is reduced or totally disallowed by the decision on the appeal or review**, the employer and the employer's insurance carrier, except as otherwise provided in this section, shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a and amendments thereto for all amounts of compensation so paid which are in excess of the amount of compensation that the worker is entitled to as determined by the final decision on review. . . .

(d)(2) If any temporary or permanent partial disability or temporary or permanent total disability benefits have been paid to the worker by the employer or the employer's insurance carrier **during the pendency of review under this section**

**and the amount of compensation awarded for such benefits by the board is reduced by the decision on the appeal or review** and the balance of compensation due the worker exceeds the amount of such reduction, the employer and the employer's insurance carrier shall receive a credit which shall be applied as provided in this subsection (d)(2) for all amounts of such benefits which are in excess of the amount of such benefits that the worker is entitled to as determined by the final decision on review or appeal. . . . (Emphasis added.)

The Board concludes respondent's credit is governed by K.S.A. 44-525(c) and K.S.A. 44-534a(b). Consequently, respondent's credit is limited to the amount of overpaid temporary total disability benefits and must be applied first to the final week of disability benefits and then to each preceding week until the credit is exhausted.

Regarding respondent's alleged overpayment of medical expense, as provided by K.S.A. 44-534a respondent has one year from the date of the final award to request the Director to certify the amount to be reimbursed by the Workers Compensation Fund.

**4. Is claimant entitled to receive unauthorized medical benefits for the February 2003 visit to Dr. Pedro A. Murati?**

Claimant requests the respondent to reimburse him \$400 towards the February 2003 medical evaluation performed by Dr. Murati. Respondent contends the evaluation was not related to claimant's January 2001 work-related accident and, therefore, it should not be required to reimburse claimant. The Board disagrees.

Dr. Murati examined claimant on February 13, 2003, and provided claimant recommendations for additional medical treatment for his left shoulder injury, which would have necessarily included the injury from the January 2001 accident and resulting surgery. At the time of this evaluation, it was important to determine what care and treatment was needed for the initial injury as opposed to any new injury. Furthermore, the doctor's examination could have shed light on whether claimant's symptoms were the result of a new and separate accident or the natural consequence of the initial injury and related surgery. The Workers Compensation Act allows a worker to consult a doctor of the worker's choice for the purpose of diagnosis, evaluation, and treatment. K.S.A. 44-510h(b)(2) provides:

Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

The Board concludes claimant's February 2003 visit with Dr. Murati qualifies as unauthorized medical treatment as contemplated by the Workers Compensation Act. Accordingly, claimant is entitled to be reimbursed up to the \$500 statutory maximum for such unauthorized medical upon proof of payment.

**AWARD**

**WHEREFORE**, the Board modifies the October 7, 2004 Nunc Pro Tunc Award and September 30, 2004 Award, as follows:

Shawn Steele is granted compensation from Home Depot for a January 5, 2001 accident and resulting disability. Based upon an average weekly wage of \$440, Mr. Steele is entitled to receive 1.23 weeks of temporary total disability benefits at \$293.35 per week, or \$360.82, plus 31.33 weeks of permanent partial disability benefits at \$293.35 per week, or \$9,190.66, for a 14 percent permanent partial disability, making a total award of \$9,551.48, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Nunc Pro Tunc Award and Award that are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary K. Albin, Attorney for Claimant  
Clifford K. Stubbs, Attorney for Respondent  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director